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Attorneys for Michael Parry and the putative class of similarly-situated individuals

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

NATIONAL SEATING & MOBILITY, INC.,

Plaintiff,

vs.

MICHAEL PARRY and DOES 1 through 20,
 inclusive,

Defendants.

MICHAEL PARRY, individually and on behalf
 of all others similarly situated,

Counter-Claimant,

vs.

NATIONAL SEATING & MOBILITY, INC.,

Counter-Claim Defendant.

Case No.: 3:10-cv-02782-JSW

**SECOND AMENDED
 COUNTER-COMPLAINT FOR
 MICHAEL PARRY:**

1. Breach of Contract – employment contract
2. Wage Claim
3. Waiting Time Penalties
5. Private Attorney General Act

CLASS CLAIMS

6. Breach of Contract
7. Failure to Calculate Wages
8. Fraud
9. Negligent Misrepresentation
10. Breach of Implied Covenant of Good Faith and Fair Dealing
11. Violation of Unfair Competition Law, Cal. Bus. & Prof. Code § 17200
12. Request for an Accounting

Michael Parry, Counter-Complainant, alleges as follows:

INTRODUCTION

This Second Amended Counter-Complaint is brought by Michael Parry individually and on behalf of all others similarly situated, to address and remedy various wrongs committed against him and all members of the proposed National Rebate Class and California Kaiser Subclass, described below.

GENERAL ALLEGATIONS SPECIFIC TO COUNTER-CLAIMANT'S INDIVIDUAL CAUSES OF ACTION

1. Michael Parry (hereinafter Counter-Claimant) is a resident of Alameda County.
2. National Seating and Mobility, Inc. (hereinafter Counter-Claim Counter-Claim Defendant) is, and at all relevant times herein was, a corporation organized and existing under the laws of the State of Tennessee. Counter-Claim Defendant is licensed to do business in the State of California.
3. Counter-Claim Defendant has an office in Hayward California.
4. On or about March 1, 2001, Counter-Claimant was employed by Counter-Claim Defendant.
5. On or about July 28, 2005, Counter-Claimant's supervisors, Tim Maddox and Ken Wilcox informed Counter-Claimant that he was entitled to a \$20,000.00 reward/bonus.
6. To date, Counter-Claimant has never received the \$20,000.00 reward/bonus.
7. Late in 2006, Counter-Claimant changed positions within Counter-Claim Defendant's company and went back to work as a commission salesperson.
8. On or about March 1, 2007, Counter-Claimant entered into an Employment Agreement with Counter-Claim Defendant pertaining to the terms of his employment with Counter-Claim Defendant as a Rehab Technology Supplier (hereinafter RTS).
9. Counter-Claimant's primary clients as an RTS were individuals who had health plans through Kaiser Permanente.
10. Counter-Claimant developed a book of business of approximately one (1) million dollars.

11. In May of 2008, Counter-Claim Defendant restructured the Hayward branch by adding a second Rehab Technology Supplier to split the Kaiser Permanente clients.

12. The new Rehab Technology Supplier was younger than Counter-Claimant.

13. When Counter-Claimant was terminated on March 31, 2009, he was informed that Counter-Claim Defendant had decided to reduce operations back to a single RTS covering the Kaiser Permanente clients.

14. Based upon information and belief, the younger employee was retained during this downsizing.

15. Paragraph 7 of the March 1, 2007 Employment Agreement states that "Except where termination is for cause, either Employer or Employee may terminate employment by providing written notice six (6) months prior to the effective termination date.

16. On or about March 31, 2009, Counter-Claimant was wrongfully terminated by Counter-Claim Defendant.

17. Counter-Claim Defendant did not give Counter-Claimant six (6) months' notice as per Paragraph 7 of the March 1, 2007, Employment Agreement.

18. Counter-Claim Defendant did not pay to Counter-Claimant six (6) months' salary, in lieu of giving him six months' notice.

CLASS ACTION ALLEGATIONS

19. Counter-Claimant brings this action on his own behalf and on behalf of all persons similarly situated within the following proposed class and subclass:

All Rehab Technology Suppliers ("RTSs") employed by National Seating & Mobility, Inc. ("NSM"), for the period from February 5, 2004 until the present who signed an Employment Agreement with NSM that contains a Tennessee choice of law clause and which contains a "COMMISSION ON SALES" provision that defines "Gross Base Office Profits" as "sales minus cost of goods, shipping changes, sales adjustments, allowance for bad debt and bad debt write off." This is the "National Rebate Class".

All Rehab Technology Suppliers ("RTSs") employed by National Seating & Mobility, Inc. ("NSM") to service Kaiser Permanente ("Kaiser") in California, for the period from February 5, 2004 until the present who signed an Employment Agreement with NSM that

1 contains a Tennessee choice of law clause and which contains a
2 “COMMISSION ON SALES” provision that defines “Gross Base
3 Office Profits” as “sales minus cost of goods, shipping changes, sales
4 adjustments, allowance for bad debt and bad debt write off.” This is
the “California Kaiser Rebate Class”.

5 20. Each of the classes that Counter-Claimant seeks to represent is so numerous that
6 the joinder of all such persons is impracticable and that the disposition of their claims in a class
7 action, rather than in individual actions, will benefit the parties and the court.

8 21. There is a well-defined community of interest in the questions of law and fact
9 involved affecting the Counter-Claimant and members of the National Rebate and California
10 Kaiser Classes in that it is alleged that Counter-Claim Defendant did not properly pay
11 commission wages. These questions of law and fact predominate over questions that affect only
12 individual National Rebate and California Kaiser Class Members. The claims of the Counter-
13 Claimant are typical of those of the class and Counter-Claimant will fairly and adequately
14 represent the interests of the class.

15 22. As used throughout this Second Amended Counter-Complaint, the terms “Class
16 Members” and/or “Counter-Claimant Class” and/or “Members of the National Rebate and
17 California Kaiser Classes” refer to the named Cross-Complainant herein as well as each and
18 every person eligible for membership in the National Rebate and California Kaiser Classes, as
19 further described and defined below.

20 23. At all times relevant herein, Counter-Claimant was, and is, a person within the
21 class of persons further described and defined below.

22 24. The “Class Period” is designated as the time from February 5, 2004 until the
23 present. Counter-Claim Defendant’s improper and unlawful conduct commenced before
24 February 5, 2004 and has continued through the present. Counter-Claimant and members of the
25 National Rebate and California Kaiser Classes also hereby reserve the right to amend this
26 Complaint for Damages and to enlarge, or reduce, the “Class Period” as discovery in this matter
27 proceeds.
28

25. Counter-Claimant, and members of the National Rebate and California Kaiser Classes, have incurred and, during the pendency of this action, will incur expenses for attorney's fees and costs herein. Such attorney's fees and costs are necessary for the prosecution of this action and will result in a benefit to each of the members of the class.

26. Counter-Claim Defendant required all RTS sign an employment agreement in which they were paid a commission based upon a percentage of Employee's proportional share of the total branch's "Gross Base Office Profits."

27. The term "Gross Base Office Profits" is defined to mean sales minus cost of goods, shipping charges, sales adjustments, allowances for bad debt and bad debt write off.

28. Counter-Claim Defendant did not properly report to Counter-Claimant and members of National Rebate and California Kaiser Classes the true cost of goods.

29. Counter-Claim Defendant refused to give to Counter-Claimant and members of the National Rebate and California Kaiser Classes a proper accounting of how cost of goods was calculated.

30. Many manufactures gave kickbacks and/or rebates to Counter-Claim Defendant thus lowering the true cost of goods and this increased profit was not reported to Counter-Claimant and the members of the National Rebate and California Kaiser Classes. A result, Counter-Claimant and the National Class and California Kaiser Subclass did not receiving their proper commissions.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT – EMPLOYMENT AGREEMENT
By Michael Parry individually against Counter-Claim Defendant

31. Counter-Claimant realleges and incorporates as if fully set forth herein each of the allegations of this Second Amended Cross-Claim as if fully set forth herein.

32. On or about March 1, 2007, Counter-Claimant executed an Employment Agreement with Counter-Claim Defendant as a Rehabilitation Technological Supplier (RTS).

33. Paragraph 7 of the March 1, 2007, Employment Agreement states that "Except where termination is for cause, either Employer or Employee may terminate employment by providing written notice six (6) months prior to the effective termination date.

36. At the time Counter-Claimant was wrongfully terminated by Counter-Claim Defendant, Counter-Claimant had performed all obligations to Counter-Claim Defendant except those obligations Counter-Claimant was prevented or excused from performing.

SECOND CAUSE OF ACTION WAGE CLAIM

38. Counter-Claimant realleges and incorporates as if fully set forth herein each of the allegations of this Second Amended Cross-Claim as if fully set forth herein.

40. In addition, Counter-Claim Defendant failed to pay to Counter-Claimant the \$20,000 already earned as a reward/bonus.

42. On or about May 28, 2009, Counter-Claimant filed a wage claim with the Department of Industrial Relations, Division of Labor Standards Enforcement. This was before Counter-Claimant was served with Counter-Claim Defendant's complaint for conversion and unjust enrichment on or about June 2, 2009.

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1 44. Accordingly, Counter-Claimant is entitled to recover his unpaid wages at the
2 applicable contract rate, in an amount to be proven at trial.

3 **THIRD CAUSE OF ACTION**
4 **WAITING TIME PENALTIES**

5 **By Michael Parry individually against Counter-Claim Defendant**

6 45. Counter-Claimant realleges and incorporates as if fully set forth herein each of the
7 allegations of this Second Amended Cross-Claim as if fully set forth herein.

8 46. As previously alleged, upon termination of his employment, Counter-Claim
9 Defendant has failed to pay Counter-Claimant for the six months' salary owed him.

10 47. Furthermore, Counter-Claim Defendant has failed to pay Counter-Claimant for
11 the \$20,000.00 bonus/award.

12 48. More than thirty days have elapsed since Counter-Claim Defendant failed to pay
13 Counter-Claimant the wages listed in the above paragraph.

14 49. Accordingly, under Labor Code §203, Counter-Claimant is entitled to recover
15 waiting time penalties calculated at the daily rate of pay, multiplied by the number of days the
16 wages went unpaid, to a maximum of thirty days, in an amount to be proven at trial.

17 **FOURTH CAUSE OF ACTION**
18 **LABOR CODE PRIVATE ATTORNEYS GENERAL ACT**
19 **By Michael Parry individually against Counter-Claim Defendant**

20 50. Counter-Claimant realleges and incorporates as if fully set forth herein each of the
21 allegations of this Second Amended Cross-Claim as if fully set forth herein.

22 51. By definition in the California Labor Code §2699 (a), Counter-Claimant is an
23 aggrieved employee. He brings this cause of action on behalf of himself and other current or
24 former employees affected by the labor law violations alleged in this cross-complaint.

25 52. Prior to filing this cross-complaint, Counter-Claimant notified Counter-Claim
26 Defendant and the Labor and Workforce Development Agency, via certified mail, of the specific
27 violations of the Labor Code, as set out in this cross-complaint.

28 53. Counter-Claim Defendant violated Labor Code §§201 and 202 by failing to pay
Counter-Claimant all wages due on the date of the employee's involuntary termination or within
72 hours of receipt of notice of an employee's voluntary termination.

1 54. Pursuant to Labor Code §2699(a), Counter-Claimant seeks to recover all civil
2 penalties provided by Labor Code §210 for which Counter-Claim Defendant is liable as a result
3 of its violations of Labor Code §204, in amount to be proven at trial.

4 **FIFTH CAUSE OF ACTION**
5 **CLASS CLAIM**
6 **BREACH OF CONTRACT**

7 55. Counter-Claimant realleges and incorporates as if fully set forth herein each of the
8 allegations of this Second Amended Cross-Claim as if fully set forth herein.

9 56. Counter-Claimant and members of both the proposed National Rebate Class and
10 the proposed California Kaiser Subclass entered into contracts with Counter-Claim Defendant
11 NSM as RTS employees.

12 57. Under these contracts, each RTS employee, including Counter-Claimant and each
13 member of the proposed National Rebate Class and the proposed California Kaiser Subclass,
14 were entitled to receive commissions under a “COMMISSION ON SALES” provision that
15 defines “Gross Base Office Profits” as “sales minus cost of goods, shipping changes, sales
16 adjustments, allowance for bad debt and bad debt write off.”

17 58. In calculating Gross Base Office Profits and in all its calculations of commission
18 payments to RTS employees, Counter-Claim Defendant NSM has consistently failed to account
19 for manufacturer kickbacks and/or rebates in calculating RTS commissions, in violation of the
20 express terms of NSM’s contract with Counter-Claimant and the members of the proposed
21 National Rebate Class and the California Kaiser Subclass. NSM’s failure to account for
22 kickbacks and/or rebates in paying commissions constitute a breach of the RTS employee
23 contract.

24 59. As to the California Kaiser Subclass, NSM arbitrarily set Gross Base Profits at an
25 arbitrary percentage that was not accurate, injuring Counter-Claimant and each member of the
26 California Base Kasier Subclass in addition to the monetary harm suffered as a result of NSM’s
27 breach of the RTS employee contract.

28 60. As result, Counter-Claimant and the members of the proposed National Rebate
Class and the proposed California Kaiser Subclass have not been paid all commissions owed to

1 them by NSM and have been injured and suffered consequential damages to be proved at trial.

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3 **SIXTH CAUSE OF ACTION**
4 **CLASS CLAIM**
5 **FAILURE TO CALCULATE WAGES**

6 61. Counter-Claimant realleges and incorporates as if fully set forth herein each of the
7 allegations of this Second Amended Cross-Claim as if fully set forth herein.

8 62. All National Rebate and California Kaiser Class Members were subject and
9 signed an employment agreement in which they were to be paid a percentage of Employee's
10 proportional share of the total branch "Gross Base Office Profits," which is comprised of sales
11 minus cost of goods, shipping charges, sales adjustments, allowances for bad debt and bad debt
12 write off.

13 63. Throughout his employment, Counter-Claimant requested Counter-Claim
14 Defendant to explain how the net profit was computed for National Rebate and California Kaiser
15 Class Members' commission, as well as how the branch split was divided.

16 64. Counter-Claim Defendant did not comply with these requests.

17 65. Many manufactures gave kickbacks and/or rebates to Counter-Claim Defendant
18 thus lowering the true cost of goods, but this increased profit was not reported to Counter-
19 Claimant and the National Rebate and California Kaiser Classes. This resulted in Counter-
20 Claimant and the National Rebate and California Kaiser Classes not receiving their proper
21 commissions.

22 66. As to the California Kaiser Subclass, NSM arbitrarily set Gross Base Profits at an
23 arbitrary percentage that was not accurate, with the result that Counter-Claimant and each
24 member of the California Base Kaiser Subclass was is owed unpaid wages in addition to the
25 monetary harm suffered as a result of NSM's breach of the RTS employee contract.

26 67. Counter-Claim Defendant continues to refuse Counter-Claimant and National
27 Rebate and California Kaiser Class Members a proper accounting of how the cost of goods was
28 calculated.

68. Counter-Claimant and the National Rebate and California Kaiser Classes hereby

1 request an accurate computation of their wages due during the class period, the payment of those
2 back wages and any other such restitution and compensation the court deems proper.

3 **SEVENTH CAUSE OF ACTION**
4 **FRAUD**
5 **CLASS CLAIM**

6 69. Counter-Claimant realleges and incorporates as if fully set forth herein each of the
7 allegations of this Second Amended Cross-Claim as if fully set forth herein.

8 70. National Rebate and California Kaiser Class Members all engaged in conduct that
9 profited Counter-Claim Defendant, in that National Rebate and California Kaiser Class members
10 all represented and sold Counter-Claim Defendant's products to various entities and end users.

11 71. As part of this relationship, Counter-Claim Defendant knowingly or recklessly
12 misrepresented the total office profits under the ETS contract that formed the basis for Counter-
13 Claimant and members of the National Rebate and California Kaiser Classes' commissions.
14 Counter-Claim Defendant made this misrepresentation with the intent that Counter-Claimant and
15 the National Rebate and California Kaiser Class members rely upon it. Counter-Claimant and
16 National Rebate and California Kaiser Class members reasonably relied on this
17 misrepresentation, which related to a past existing fact—the true gross office profits—and
18 suffered damages a result.

19 72. Counter-Claimant has requested, on numerous occasions, an accounting of the
20 Gross Base Profits and his proportional share and Counter-Claim Defendant has always refused
21 to provide such an accounting, though it has continued to pay some commission sales,
22 representing the commission sales to be the full amounts owed to the employees.

23 73. Based on Counter-Claim Defendant's refusal to provide an accounting, Counter-
24 Claimant and National Rebate and California Kaiser Class Members have reason to believe
25 Counter-Claim Defendant is intentionally and deliberately misrepresenting and obfuscating the
26 true value of the Gross Base Profits of each office.

27 74. As to the California Kaiser Subclass, NSM intentionally or recklessly set Gross
28 Base Profits at an arbitrary percentage that was not accurate, with the result that Counter-

1 Claimant and each member of the California Base Kaiser Subclass was is owed additional unpaid
2 wages.

3 75. Counter-Claim Defendant's practices as they pertain to the calculation,
4 representation, and payment of Gross Base Profits are consistent across the country.

5 76. Because of Counter-Claim Defendant's willfully fraudulent actions, Counter-
6 Claimant and the National Rebate and California Kaiser Class Members have been damaged.

7 77. Counter-Claimant and National Rebate and California Kaiser Class Members
8 request their rightful commissions, punitive damages, injunctive and declaratory relief
9 prohibiting Counter-Claim Defendant from continuing its fraudulent miscalculation of wages,
10 and any other compensation the court deems proper.

11 **EIGHTH CAUSE OF ACTION**
12 **NEGLIGENT MISREPRESENTATION**
13 **CLASS CLAIM**

14 78. Counter-Claimant realleges and incorporates as if fully set forth herein each of the
15 allegations of this Second Amended Cross-Claim as if fully set forth herein.

16 79. As stated above, all National Rebate and California Kaiser Class Members were
17 subject to, or had signed, an employment agreement in which they were to be paid a percentage
18 of the employee's proportional share of the total branch "Gross Base Office Profits," which is
19 comprised of sales minus cost of goods, shipping charges, sales adjustments, allowances for bad
20 debt and bad debt write off. This proportional share in profits was a deliberate representation by
21 Counter-Claim Defendant to all the National Rebate and California Kaiser Class Members.

22 80. Counter-Claim Defendant intended for Counter-Claimant and members of the
23 National Rebate and California Kaiser Classes to rely upon its representations about Gross
24 Office Profits and commissions owed.

25 81. NSM acted in the course of its business when it negligently supplied false and/or
26 misleading information about Gross Office Profits and commissions owed to Counter-Claimant
27 and members of the National Rebate and California Kaiser Classes.

28 82. Many manufactures gave kickbacks and/or rebates to Counter-Claim Defendant,
thus lowering the true cost of the goods. Counter-Claim Defendant negligently failed to report

1 this increase of profit to Counter-Claimant and the National Rebate and California Kaiser Class
 2 Members, resulting in Counter-Claimant and National Rebate and California Kaiser Class
 3 Members not receiving their proper commissions. Counter-Claim Defendant knew or should
 4 have known that these kickbacks and/or rebates would increase the sales commissions owed to
 5 the Counter-Claimant and the National Rebate and California Kaiser Class Members.

6 83. Counter-Claimant and National Rebate and California Kaiser Class Members
 7 reasonably relied on Counter-Claim Defendant's representations and have been damaged by not
 8 receiving their proper commissions.

9 84. As to the California Kaiser Subclass, NSM arbitrarily set Gross Base Profits at an
 10 arbitrary percentage that was not accurate, with the result that Counter-Claimant and each
 11 member of the California Base Kaiser Subclass was is owed additional unpaid commissions.

12 85. Counter-Claimant and National Rebate and California Kaiser Class Members
 13 request relief in the form of their commissions due, for injunctive and declaratory relief
 14 prohibiting Counter-Claim Defendant from continuing its fraudulent miscalculation of wages and
 15 any other compensation the court deems proper.

16 **NINTH CAUSE OF ACTION**
 17 **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND**
 18 **FAIR DEALING – BAD FAITH**
 19 **CLASS CLAIM**

20 86. Counter-Claimant realleges and incorporates as if fully set forth herein each of the
 21 allegations of this Second Amended Cross-Claim as if fully set forth herein.

22 87. Counter-Claim Defendant was obligated to compensate Counter-Claimant and
 23 members of the National Rebate and California Kaiser Classes a set share Gross Office Profits,
 24 as alleged above.

25 88. Counter-Claimant has requested, on numerous occasions, accountings of the total
 26 office profits and the appropriate calculation of the proportional share.

27 89. Counter-Claim Defendant has refused to provide such accountings and has
 28 continued to insist that the amounts it is paying to Counter-Claimant and members of the
 National Rebate and California Kaiser Classes, without accountings, are appropriately calculated

1 compensation.

2 90. Counter-Claim Defendant has received kickbacks and/or rebates and has engaged
3 in other practices that lower the costs of the products it sells, which kickbacks and/or rebates and
4 other practices Counter-Claim Defendant has not revealed to Counter-Claimant and members of
5 the National Rebate and California Kaiser Classes, and which kickbacks and/or rebates and other
6 practices are not accounted for when calculating Counter-Claimant and National Rebate and
7 California Kaiser Class Members' compensation. This conduct has resulted in the intentional
8 deprivation of compensation already earned and lawfully owed to Counter-Claimant and
9 members of the National Rebate and California Kaiser Classes. Essentially, Counter-Claimant
10 alleges that Counter-Claim Defendant intentionally misstated its profits in order to enhance its
11 ultimate bottom line, lying to Counter-Claimant and members of the National Rebate and
12 California Kaiser Classes as to the true degree of its profits and thus deceiving Counter-Claimant
13 and members of the National Rebate and California Kaiser Classes as to the true and appropriate
14 amount of compensation due them.

15 91. Furthermore, Counter-Claim Defendant has refused, prevented, and obstructed
16 Counter-Claimant and members of the National Rebate and California Kaiser Classes' attempts
17 to ascertain and calculate the true and appropriate amount of their compensation, thus dealing
18 with National Rebate and California Kaiser Class Members in bad faith.

19 92. As to the California Kaiser Subclass, NSM arbitrarily set Gross Base Profits at an
20 arbitrary percentage that was not accurate, with the result that Counter-Claimant and each
21 member of the California Base Kaiser Subclass was is owed additional unpaid wages.

22 93. In so dealing with Counter-Claimant and National Rebate and California Kaiser
23 Class Members, Counter-Claim Defendant acted despicably with a conscious and willful
24 disregard of the rights of the Counter-Claimant and members of the National Rebate and
25 California Kaiser Classes, with the purpose of depriving Counter-Claimant and members of the
26 National Rebate and California Kaiser Classes from compensation already earned and lawfully
27 due to them, causing Counter-Claimant and members of the National Rebate and California
28 Kaiser Classes to suffer financial loss. Counter-Claim Defendant's oppressive and malicious

conduct toward the Counter-Claimant and members of the National Rebate and California Kaiser Classes was in bad faith, justifying an award of compensatory, exemplary, and punitive damages.

**TENTH CAUSE OF ACTION
VIOLATION OF UNFAIR COMPETITION LAW – Cal. Bus. & Prof. Code §17200
BY COUNTER-CLAIMANT AND THE CALIFORNIA KAISER SUBCLASS**

94. Counter-Claimant realleges and incorporates as if fully set forth herein each of the allegations of this Second Amended Cross-Claim as if fully set forth herein.

95. The California Business and Professions Code provides for a Cause of Action where Counter-Claim Defendants, as part of their business practices, engage in a course of conduct that is “unlawful, unfair or fraudulent.” Cal. Bus. Prof. Code §17200.

96. Counter-Claim Defendant has unlawfully, unfairly, and fraudulently miscalculated the commissions due Counter-Claimant and California Kaiser Subclass.

97. Counter-Claimant and California Kaiser Subclass Members hereby seek relief in the form of restitution for wages and compensation lost and for injunctive and declaratory relief prohibiting Counter-Claim Defendant from continually promulgating, implementing, and enforcing policies that deny Counter-Claimant and California Kaiser Subclass Members their just commissions.

**ELEVENTH CAUSE OF ACTION
REQUEST FOR ACCOUNTING
By all Counter-Claimants against Counter-Claim Defendant**

98. Counter-Claimant realleges and incorporates as if fully set forth herein each of the allegations of this Second Amended Cross-Claim as if fully set forth herein.

99. Counter-Claim Defendant owes Counter-Claimant and members of the National Rebate and California Kaiser Classes wages from commissions that were improperly computed, along with statutory penalties and interest.

100. Counter-Claimant and members of the National Rebate and California Kaiser Classes do not know the precise amounts of compensation due them. Counter-Claim Defendant possesses records from which the amount of compensation due Counter-Claimant and members of the National Rebate and California Kaiser Classes can be appropriately determined.

101. As the amounts due Counter-Claimant and members of the National Rebate and

California Kaiser Classes in statutory interest and penalties are based on the compensation already due Counter-Claimant and members of the National Rebate and California Kaiser Classes, these amounts can only be determined by an accounting of Counter-Claim Defendant's books and records.

WHEREFORE, Counter-Claimant individually prays for judgment as follows:

1. For compensatory damages according to proof and prejudgment interest thereon to the extent allowable by law;
2. For exemplary and punitive damages according to proof;
3. For "Waiting Time" Penalties, as defined and applicable under Cal. Lab. Code §§ 203, 218;
4. For the payment of Counter-Claimant's attorney fees, costs, and expenses incurred pursuant to all applicable provisions of California Law including, but not limited to, Cal. Lab. Code §§ 218.5, 1194, and Cal. Code Civ. Pro § 1021.5;
5. For such other and further relief as the court may deem proper.

WHEREFORE, Counter-Claimant and Counter-Claimant and members of the National Rebate and California Kaiser Classes pray judgment as follows:

1. An order declaring this action to be a class action and appointing the law firm of Kershaw, Cutter & Ratnoff, LLP and the Law Offices of Mark P. Meuser as class counsel and certifying the class as alleged and requested herein;
2. For compensatory damages according to proof at trial;
3. For exemplary and punitive damages according to proof;
4. For pre-judgment interest at the legal rate from and after January 11, 2009 at the legal rate;
5. For an Accounting, as requested in the Eleventh Cause of Action;
6. For the payment of Counter-Claimant's attorney fees, costs, and expenses incurred pursuant to all applicable provisions of California and Federal Law including, but not limited to, Cal. Lab. Code §§ 218.5, 1194, Cal. Code Civ. Pro § 1021.5, and Fed. R. Civ. P. 23; and

1 7. For such other and further relief as the court may deem proper.

2 Dated: June 19, 2012

Respectfully submitted,

3 Kershaw, Cutter & Ratinoff, LLP

4
5 By: /s/ C. Brooks Cutter

6 C. Brooks Cutter

7
8 Law Offices of Mark P. Meuser

9
10 By: /s/ Mark P. Meuser

11 Mark P. Meuser